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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. ~~960~~ 112

RAYMOND E. FISHER,

Petitioner,

vs.

CHESAPEAKE & OHIO RAILWAY COMPANY,
A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

OWEN RALL,
135 South La Salle Street,
Chicago 3, Illinois,

HENRY T. SYNEK,
134 South La Salle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

PETERSON, LOWRY, RALL, BARBER & ROSS,
135 South La Salle Street,
Chicago 3, Illinois,
Of Counsel.

R. R. DONNELLEY & SONS COMPANY, CHICAGO

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Photograph taken while standing in the Eastbound Lane of U.S. Highway 224 about 150-175 feet West of the railroad intersection looking East.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RAYMOND E. FISHER, your petitioner, who was plaintiff in the United States District Court, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered March 14, 1960.

OPINION BELOW.

The opinion of the Court of Appeals is printed in full as Supplement A (p. i, below) and has not yet been reported (*Fisher* v. *Chesapeake & Ohio Ry. Co.*, ... F. 2d ....).

No opinion was filed by Chief Judge William J. Campbell, Northern District of Illinois, whose judgment was reversed by the Court of Appeals.

JURISDICTION.

The judgment of the Court of Appeals was entered March 14, 1960 (Supplement B, p. viii, below) and it became final on April 13, 1960 by denial of the plaintiff's petition for a rehearing (Supplement C, p. ix, below). The jurisdiction of this Court is invoked under the provisions of U. S. C. sec. 1254(1).

QUESTIONS PRESENTED.

Two successive juries, properly instructed that the plaintiff truck driver could not recover for serious personal injuries suffered at defendant's railroad crossing unless he proved that he was in the exercise of due care, found substantial verdicts in favor of the plaintiff. The second verdict (for $70,000) was approved by a conscientious and careful trial judge (Chief Judge William J. Campbell) against the defendant's contention that the plaintiff was guilty of contributory negligence. The Court of Appeals for the Seventh Circuit reversed the trial court's judgment on the sole ground that as a matter of Ohio law—the accident having occurred there—the plaintiff was guilty of contributory negligence.

The questions which arise are:

1. Whether the plaintiff's right to a jury trial under the Seventh Amendment to the Constitution of the United States has been taken from him by the action of the Court of Appeals in weighing conflicting evidence and conflicting inferences from contradicted evidence and in reversing the jury's factual determination that the plaintiff was in the exercise of due care at the time of the serious injuries which he sustained, including the loss of his left leg. We contend that plaintiff's constitutional rights were thus invaded.

2. Whether the Court of Appeals for the Seventh Circuit, which Circuit does not include Ohio, properly interpreted the law of Ohio, when the Court reversed without a new trial the jury's verdict that the plaintiff was in the exercise of due care in approaching an unfamiliar crossing which reasonably appeared to him to be a single railroad track. He sustained serious injury from a northbound train which came at the rate of 45 miles an hour from behind a southbound train which obscured the plaintiff's vision until 10 seconds before a collision between defendant's northbound train and plaintiff's truck, without any warning to permit the plaintiff to avoid the collision. We contend that the Ohio cases relied upon by the Court of Appeals are inapplicable here because the plaintiff was unfamiliar with the crossing involved, and the defendant failed to warn the plaintiff that what reasonably appeared to be a single track railroad intersecting a heavily traveled U. S. Highway (No. 224) was in reality a high speed double track.

3. Whether the decision of the Court of Appeals in this case, which ignored the interplay of the defendant's negligence *as a matter of fact* in determining the question whether the plaintiff was guilty of contributory negligence *as a matter of law*, is in conflict with cases in the Sixth Federal Circuit which interpret Ohio law dealing with plaintiff's contributory negligence as not requiring a plaintiff to anticipate negligence on the part of a defendant. We contend that the decision in the instant case conflicts with the Sixth Circuit case of *Northwest Airlines* v. *Glenn L. Martin Co.*, 224 F. 2d 120 (C. A. 6, 1955) holding (p. 127) that under Ohio law it "is not contributory negligence to fail to look out for danger when there is no reason to apprehend any" and that a plaintiff "is not required to anticipate negligent acts or omissions on the part of others," and with *New York Central Railroad Company* v.

Delich, 252 F. 2d 522 (C. A. 6, 1958), holding on facts which were very similar to the relevant facts in our case that (p. 526) "where, because of the inherent hazards of the several tracks, the great speed of the train, the physical condition of the crossing, the lack of due warning and other circumstances set out here, reasonable minds might differ as to whether the decedent was showing due care, both Ohio courts and this court, construing Ohio law, have upheld verdicts for plaintiff."

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provision involved herein is the Seventh Amendment to the Constitution of the United States which is:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Statutory provisions involved herein are Ohio Revised Statutes and Tracks and Crossings—Section 4955.32 (8853):

> "Every company shall attach to each locomotive engine passing upon its road a bell of the ordinary size in use on such engines and a steam or compressed air whistle. When an engine in motion and approaching a turnpike, highway, or street crossing or a private crossing, where the view of such crossing is obstructed by an embankment, trees, curve, or other obstruction to view, upon the same line with the crossing, and in like manner where the railroad crosses any other traveled place by bridge or otherwise, the engineer or person in charge of such engine shall sound such whistle at least 80 and not further than 100 rods from such crossing and ring such bell continuously until the engine passes the crossing." (App. 124.)

Section 4907.47:

"If, in the opinion of the public utilities commission, the public safety requires that a gate, automatic alarm bell, or other mechanical device should be erected and maintained at any place where a public road or street is crossed at the same level by a railroad, and the crossing has been declared by the commission to be dangerous, or the public safety requires that a flagman be stationed and maintained at such crossing, the commission shall give the superintendent, manager, or other officer in charge of such railroad, a written notice of what is required. The company, person, or corporation owning or operating such railroad shall erect such mechanical device or station such flagman within the time prescribed by the commission. * * *." (App. 125.)

STATEMENT.

Petitioner, the plaintiff, a resident of Illinois, sued the respondent, the defendant, a corporation of Virginia, in the United States District Court for the Northern District of Illinois under the district court's diversity jurisdiction, for serious injuries to his person and property damage to his truck growing out of a collision between plaintiff's eastbound truck and a northbound train of defendant at defendant's crossing of U. S. Highway 224 in Seneca County, Ohio (App. 3-7).

[The case was presented in the Court of Appeals on a separately printed Appendix for Defendant-Appellant, herein called "App." and an Additional Appendix attached to Plaintiff-Appellee's brief, herein called "Addl. App." Certified copies and nine uncertified copies of the above two appendices have been filed in this Court. Also the original transcript and exhibits certified by the Clerk of the Court of Appeals have been filed herein.]

The complaint filed in the District Court alleged that the plaintiff was in the exercise of due care for his own safety (App. 4), that the injury was caused solely by the negligence of the defendant (App. 4), and also *inter alia* that the defendant negligently failed to install warning bells, automatic flashing red lights, automatic gates, or other signals or devices, or a watchman or guard, that the crossing was extrahazardous because it intersected a heavily traveled public highway, because there was a definite change of grade so that a full view of the crossing revealing more than one track was completely obscured and because there were no warning signs at the crossing or at any distance prior to the crossing that there was more than one track (App. 5-6).

The complaint alleged various other acts of negligence on the part of the defendant: failing to sound a bell or whistle within 80 to 100 rods from said crossing as required by Section 4955.32 of the Ohio Revised Statutes, operating its train at excessive speed having regard for the intersecting heavily traveled public highway and all of the surrounding circumstances, and other negligent acts which it is unnecessary to mention here because the Court of Appeals reversed the jury verdict solely on the ground that in the opinion of that Court the plaintiff was, under Ohio law, guilty of contributory negligence as a matter of law.

The defendant filed an answer (App. 8-12) denying generally the plaintiff's allegation of due care and of defendant's negligence, and pleading that the crossing was in open country and the full vision of said crossing was apparent to any driver of a truck who was in the exercise of due care for his own safety (App. 11).

The defendant's answer did not deny that there was no sign or other warning that there was more than one track but alleged that "said crossing was an open one in the country where there was full visibility, where signs indicated the existence of said railroad crossing and where a view of the approach of the northbound train of defendant was afforded" (App. 11).

The first trial before Judge Walter J. LaBuy resulted in a verdict for plaintiff of $88,000. Judge LaBuy denied defendant's motion for judgment notwithstanding the verdict but granted defendant a new trial (App. 1).

The new trial before Chief Judge William J. Campbell resulted in a verdict for plaintiff for $70,000 (App. 232) upon which Judge Campbell entered judgment (App. 232). Defendant filed a motion for a directed verdict on which action had been reserved, and for judgment notwithstand-

ing the verdict on the ground, *inter alia*, that the evidence showed conclusively that plaintiff's injuries resulted from his own negligence and there was no evidence that plaintiff was free from negligence (App. 233). This motion and an elaborate motion for a new trial (App. 233-235) were denied by Judge Campbell (App. 240).

Judge Campbell's charge to the jury (App. 117-135) was a very fair one and placed on the plaintiff the burden of proving his own due care as well as the negligence of the defendant. We urge this Court to examine the charge to the jury.

On appeal, the Court of Appeals reversed, as has been stated, solely on the ground that, under Ohio crossing cases which it cited, the plaintiff was guilty of contributory negligence as a matter of law.

The evidence on the trial was conflicting but the evidence taken most favorably to the plaintiff, as must be done after a favorable jury verdict, indicated the following:

Plaintiff, an experienced truck driver, aged 27, who had never had a prior accident (Addl. App. 1) was driving a 9,000 pound tractor and 13,000 pound trailer loaded with 36,000 pounds of butter eastbound on U. S. 224, a main east and west federal arterial highway, about noon on February 7, 1954, just west of the defendant's two-track crossing over which plaintiff had never traveled before (App. 19).

Plaintiff's Exhibit 1 (App. 139) reproduced on the inside front cover of this Petition is a view of the crossing as seen by the plaintiff as he approached it. This looks like a single track crossing. Because of a dip or declevity in the highway west of the crossing, the second (northbound) track is obscured so that the crossing looks like one track—"the way you see there was one track" (App. 20). The second track cannot be seen from the bottom of the declev-

ity (App. 20-32, 41-42, 139). It was stipulated on the trial that there was no sign indicating more than one track (Addl. App. 2). There was a simple cross-buck sign observable in Plaintiff's Exhibit 2 which read "Railroad Crossing Lookout for Locomotive" (App. 21, 142). Defendant stipulated that there were no stop signs, flasher lights, automatic gates, bells or other safety devices or any crossing guard signalling the approach of the northbound train or guarding the crossing as the train approached (App. 21, 24, 28, 114, Addl. App. 1-2).

U. S. Highway 224, about 150 feet west of the railroad crossing, dipped 4 to 8 feet below the grade of the crossing (App. 20, 28, 31, 53-54, 57, 59, 63, 64). The downgrade into this dip coming from the west obscured a driver's view of the crossing (App. 32, 55).

The defendant's double tracks cross Highway 224 in a generally north and south direction (App. 71) but south of the highway there is an "S" curve westward (App. 27, 71) so that a southbound train completely obscures a northbound train (App. 27).

This rail crossing was extrahazardous because of

—heavy traffic on U. S. 224 (App. 53; Plaintiff's Exhibits 94-95, App. 152-157);

—a double-track high speed roadbed (App. 70; Plaintiff's Exhibits 3, 4, 5, App. 141-143);

—heavy railroad traffic (App. 70, Plaintiff's Exhibit 98, App. 158-168). with a 70 miles an hour limit for passenger trains and 60 miles an hour limit for freight trains (App. 45);

—an 8 foot dip 150 feet west of the railroad crossing, causing a 7 per cent rise commencing 150 feet west of the track (App. 20, 28, 31, 32, 53-54, 55, 57, 59, 63, 64);

—the S-curve located south of the crossing so that southbound trains blocked a view of northbound trains (App. 27, 109);

—the northbound track was on a downgrade at its intersection with U. S. Highway 224 (App. 107, 111-112).

When driving eastward about three-quarters of a mile west of the crossing on the day of the collision plaintiff saw a train at the crossing going in a southerly direction (App. 20, 35). There was no mark showing 2 tracks (App. 20, Addl. App. 2) and "the way it was marked and everything the way you see there was one track" (App. 20).

Plaintiff took his foot off the gas pedal and started slowing down and continued to decelerate (App. 20). At a point 200 feet from the crossing the southbound train cleared the crossing and when plaintiff was coming up out of the dip in the highway 150 feet from the railroad crossing he looked north from where the southbound train had come and was listening for a train. He then looked south and saw the northbound train coming from behind the southbound train 600 feet away at a rate of 45 miles per hour (App. 27, 100, 211). The front end of the northbound train passed the caboose of the southbound train about 150 to 200 yards [450 to 600 feet] south of Highway 224 (App. 24).

Only when the engine of the northbound train cleared the caboose did it whistle—approximately 600 feet from the highway (App. 21, 24).

At 45 miles per hour the northbound train traveled 66 feet per second and so traveled the distance of 600 feet in less than 10 seconds.

In this period plaintiff applied all the brakes he had, swerved his truck to the left to go into the ditch, but found it too deep, so he turned the truck south, to his right, in an

effort to go south on the southbound track and he almost stopped, going 2 or 3 miles an hour (App. 20). The defendant's diesel caught the left front corner of the truck (App. 20, 39) and seriously injured the plaintiff so that his left leg had to be amputated (App. 23).

The defendant's engine crew was completely familiar with the crossing at U. S. Highway 224 ("crossed there about every day for some 30 years;" App. 69; "have gone over it thousands of times" App. 109), were in significant disagreement as to the distance south of the highway at which the engine of the northbound train emerged from behind the caboose of the southbound train (App. 67, 107), and admittedly did not slow down even though they knew that the southbound train obscured a view of their train by eastbound highway traffic (App. 110).

REASONS FOR GRANTING THE WRIT.

I. The Court of Appeals has re-examined the evidence other "than according to the rules of the common law" and thereby invaded the plaintiff's right of trial by jury guaranteed by the Seventh Amendment to the Constitution of the United States.

II. The Court of Appeals has decided an important question of Ohio law in a manner inconsistent with Ohio cases which hold that when the question of contributory negligence depends on a variety of circumstances, from which different minds may arrive at different conclusions as to whether there was negligence or not, the question should be submitted to the jury. The Ohio cases cited by the Court of Appeals to take the instant case out of the general rule are inapposite here because in those cases the plaintiffs were familiar with the railroad crossings involved, whereas here the plaintiff was not. Here there was no warning that there were two tracks, either by a sign

or by the safety devices which the jury could have found to be customary at double-track crossings over heavily-traveled arterial highways. There is no presumption of law that tracks are double-tracks and it was for the jury to say whether under all the circumstances the plaintiff was justified in acting on his belief that the crossing here was a single-track.

III. In reaching its conclusion that the plaintiff was guilty of contributory negligence as *a matter of law* the Court of Appeals rendered a decision which ignored the interplay of the defendant's negligence *as a matter of fact,* and which conflicts with Ohio law as announced and followed in the Sixth Circuit case of *Northwest Airlines* v. *Glenn L. Martin Co.,* 224 F. 2d 120 (C. A. 6, 1955), holding (p. 127) that under Ohio law it "is not contributory negligence to fail to look out for danger when there is no reason to apprehend any" and that a plaintiff "is not required to anticipate negligent acts or omissions on the part of others," and which conflicts with *New York Central Railroad Company* v. *Delich,* 252 F. 2d 522 (C. A. 6, 1958), that (p. 526) "where, because of the inherent hazards of the several tracks, the great speed of the train, the physical condition of the crossing, the lack of due warning and other circumstances set out here, reasonable minds might differ as to whether the decedent was showing due care, both Ohio courts and this court, construing Ohio law, have upheld verdicts for plaintiff."

ARGUMENT.

I.

The Judgment of the Court of Appeals Invaded the Plaintiff's Right to a Jury Trial under the Seventh Amendment to the Constitution of the United States.

We submit that the Court of Appeals invaded the constitutional right of the plaintiff to a jury trial in its decision in the instant case.

The provision of the Seventh Amendment, "no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law" is "a prohibition to the courts of the United States to reexamine any facts tried by a jury in any other manner." *Parsons* v. *Bedford,* 3 Pet. 433 (1830).

We respectfully submit that in determining that the plaintiff was guilty of contributory negligence in this case the Court of Appeals invaded the province of the jury.

This Court said in *Washington and Georgetown Railroad Co.* v. *McDade,* 135 U. S. 554 (1889):

> "As a general rule, the question of contributory negligence is one for the jury, under proper instructions by the court, especially where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences."

This case has been cited and approved as recently as January 25, 1960—*Davis* v. *Virginian Railway Co.,* 361 U. S. 354, 357.

As this Court has repeatedly said: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different infer-

ences or conclusions or because judges feel that other results are more ~~favorable~~."—*Tennant* v. *Peoria and Pekin Union R. Co.*, 321 U. S. 29, 35 (1944); *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 110 (Nov. 30, 1959), reversing 256 F. 2d 156 (C. A. 5, 1958).

The petitioner by his petition for rehearing in the Court of Appeals contended that setting aside the verdict in the present case deprived the plaintiff of that jury trial according to the common law which the Federal Constitution guaranteed him.

In answer, defendant contended that cases arising under the Federal Employers Liability Act, such as *Tennant*, *supra*, were not in point because they involved rights granted by a Federal statute. The Courts of Appeal for the Fourth and Sixth Circuit have made no such distinction and we submit that no such distinction exists.

In *Pennsylvania R. R.* v. *Goldie*, 182 F. 2d 9 (C. A. 6, 1950), the Court said (p. 12):

> "It is true that the cases cited are all cases involving the Federal Employers Liability Act, 45 U. S. C. A. § 51 et seq. We see, however, no difference in principle in differentiating the function of the court from that of the jury between cases under that act and cases otherwise arising in the federal courts involving actions for damages due to negligence."

The right to a jury trial under the Federal Constitution is not limited to F. E. L. A. cases and on a motion for a directed verdict (or judgment notwithstanding the verdict) the court "must accept as true all the facts favorable to the plaintiff which the defendant tends to prove and draw all reasonable inferences against the defendant."

> *Grooms* v. *Minute-Maid*, 267 F. 2d 541, 546 (C. A. 4, 1959).
>
> *Town of Ninety-Six* v. *Southern Railway Co.*, 267 F. 2d 579, 582 (C. A. 4, 1959).

Neither of the two cases just cited is an F. E. L. A. case.

The evidence on the trial of the instant case on the issue of the plaintiff's due care raised the questions

—whether the dip in U. S. Highway 224 west of the defendant's two-track railway right-of-way was sufficient to interfere with the plaintiff's vision of the second (northbound) track;

—whether the undoubted failure of the defendant to give warning that the crossing comprised two tracks did under all of the circumstances of the instant case relieve the plaintiff of the duty of stopping, looking and listening for a possible northbound train on a hidden track of which he had no warning;

—whether the combination of the dip in the highway, the physical appearance of the railroad crossing as plaintiff approached it from the west [see Plaintiff's Exhibit 1 on the inside front cover of this Petition], the failure of the defendant to warn of the existence of the second track, and the failure of the train to give the statutory whistle signal 80 to 100 rods south of U. S. Highway 224, taken together, would support a finding by the jury that the plaintiff was in the exercise of due care.

In spite of a jury verdict in favor of the plaintiff on all of the above issues the Court of Appeals, on a judge-made determination that the plaintiff was guilty of contributory negligence as a matter of law, took from the plaintiff his judgment for $70,000.

The Court of Appeals held, contrary to the jury's verdict, that the "plaintiff approached the railroad crossing in level country" (p. vi, below).

This statement is contrary to the testimony of plaintiff (App. 20, 21, 42), the testimony of a local farmer who resided in the area for 47 years (App. 27, 28), of the farmer's 22 year old son who lived all of his life in the vicinity (App. 31, 32), and the testimony of an Ohio state

highway patrolman who investigated the accident (App. 53-54, 57), none of which evidence was contradicted.*

The opinion of the Court of Appeals also states (below, p. vi) that there "was no obstruction to his view of the tracks in any feature of the crossing itself." Granting that the declevity in Highway 224 west of the crossing was

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*The Plaintiff, Raymond Earl Fisher, testified (App. 42):

"He [the southbound train] was still there in the corner of my vision as I went down into that dip. When I was 350 feet from the crossing, I was going down enough so that the dip obstructed the tracks, and everything appeared with the top of the cab coming down. * * * At that time there was a dip at the place that obstructs your view."

Fred Roosevelt Scaife, a local farmer who resided in the area for 47 years (App. 28):

"There is a dip west of the intersection, roughly between 150 to 200 feet, and the dip extends down about 8 feet. The roadbed of the railroad tracks is about 8 feet above the lowest part of the dip."

Robert Lee Scaife, aged 22, who lived in the area all of his life (App. 31):

"There is a dip west of the railroad. The dip begins approximately 200 feet west of the railroad track and at the bottom of the dip the railroad bed is approximately 8 feet above it."

H. R. LaWarre, State Highway Patrolman:

"There is an upgrade from the approach to the railroad up to the grade crossing. * * * At the time of the accident, there was a dip west of the intersection. * * * I would say it would be approximately 100 to 250 feet west of the railroad proper, the bottom of this downgrade. Then it goes on a definite upgrade to the grade crossing. The distance from the bottom of the dip to the top of the rails of the railroad track would be an estimate, I would say, in excess of 4 feet." (App. 53-54.)

"The low part of the dip as you approach the crossing from the west is about 150 to 200 feet from the crossing." (App. 57.)

not a "feature of the crossing itself", nevertheless, the dip 150 feet west of the crossing was an obstruction to the view of the east track, the second set of tracks. The plaintiff, being a stranger to the crossing and not being familiar with it and not having been apprised of the existence of the second set of tracks by any warning sign, and being unable to see the second track because of the dip, could not know that his view of a second set of tracks was being obstructed by the southbound train.

That the dip in the highway west of the crossing impeded the plaintiff's view of the second set of tracks is fully substantiated by the record:

(a) Admissions against interest in defendant-appellant's reply brief in the Court of Appeals (p. 2):

> "Since the tracks lie in a horizontal plane, only the near tracks would be presented to the eye."

(b) Plaintiff's Exhibit 1 (inside front cover of this Petition) shows that the second set of tracks was not visible to a traveler approaching from the west, even while driving upgrade from the dip. Both tracks were completely obscured on the downgrade.

(c) The obstruction to the plaintiff's view of the tracks caused by the dip in the road is fully established by the testimony of the following witnesses:

The plaintiff, Raymond E. Fisher:

> "At this point there was this dip where I started to go down. He [the southbound train] went out of my vision. (App. 20.)
>
> "He [the southbound train] was still there in the corner of my vision when I went into that dip. When I was 350 feet from the crossing, I was going down enough so that the dip obstructed the tracks and everything disappeared with the top of the cab coming down. I couldn't see how far the southbound train had gone past the crossing. At that time there was a dip at the place that obstructs your view." (App. 42.)

Robert Lee Scaife:

> "I would say there is something about that dip which interferes with vision as you drive east. Right there you can't tell if it is a double track or a single track. From where the truck was, you can't tell if it is a double track or a single track." (App. 32.)

H. R. LaWarre:

> "The dip also obstructed your view. As the vehicle approaches the railroad track going down the downgrade, your view if you want to see something up here, just like looking out an airplane without looking out the windows or something, I mean, you just don't have the view ahead of you unless you get out of your driving position. I have done it many times and I know, especially at that crossing. You are looking out on a parallel line with the bottom of the vehicle and regardless of where the bottom of the vehicle goes, the parallel line of your sight does not change. Therefore, when you are going downgrade, you are looking downgrade, and if you have to look up a hill or grade crossing, you would either have to get down like this and look up or whatever it might be. It would definitely obstruct your view of the crossing." (App. 55.)

The statement by the Court of Appeals that the plaintiff "started accelerating to go across on the assumption that no other train was coming" (p. vi, below) is inaccurate. First, plaintiff did not accelerate. Second, he did not know of the second track so, emphatically *he did not "assume"* either that a train was; or was not, coming on that unknown and hidden track. Plaintiff testified that he continued to decelerate (App. 20), the farmer driving behind him testified that the witness caught up with the plaintiff because plaintiff decelerated (App. 27), and even the fireman on the defendant's northbound train testified that the truck appeared to be slowing down (App. 68). The police report (App. 94) states that the plaintiff "dropped into fourth gear", not that he accelerated. There is no testimony whatever that plaintiff accelerated.

That the jury could reasonably find that the crossing looked to plaintiff, coming from the west, to be a single track, not a double track, is shown

—by Plaintiff's Exhibit 1, inside front cover of this Petition (App. 139).

—by Plaintiff's testimony (Addl. App. 1, Original Transcript, p. 14):

> "I was listening for a train, and I had seen him as I come up again off over here, just a glimpse of him, and about that time I seen another one come out of somewhere, and this confused me because to me this was just the way it was marked and everything the way you see there was one track."

—and by the local farmer's testimony on cross-examination (App. 32, Addl. App. 2, Original Transcript, pp. 37-OO and 37-PP):

> "Q. (by defendant's attorney) You mean at this point here (indicating), you can't tell whether that is a single track or a double track, is that right?
> "A. I couldn't tell in his position, no, I couldn't.
> "Q. Could be either one?
> "A. Could be either one.
> "Q. Either a double track or a single track?
> "A. There is no mark—"

Defendant argued in the Court of Appeals, below, that "plaintiff as an experienced truck driver over Highway 224, through Ohio, must have known that most open country crossings are double track. It is apparent that for plaintiff to assume that the crossing was a single track is itself negligence * * *" (Ans. to Petn. for Rehearing, p. 3). We submit that these arguments, although actually unsupported by evidence, were questions only for the jury, not for the Court of Appeals, and that the jury having rejected the arguments and held in plaintiff's favor, the Court of Appeals should not have disregarded the jury's verdict.

The opinion of the Court is completely silent on the plaintiff's allegation (App. 5-6) denied by defendant (App. 10-11) that the second, northbound track was obscured by the change in grade. The only thing said by the Court about this question is (p. iii, below):

> "There also was a depression in the highway which reached its low point some 200 feet west of the crossing which, *according to plaintiff's testimony*, obstructed plaintiff's view to the south as he traveled down-grade to the low point thereof." (Italics ours.)

This clearly implies, contrary to the strong corroborating evidence just elaborated, that only the plaintiff's unsupported word mentioned the obstruction of vision caused by the dip in the pavement. The court below does not state whether in fact there was an obstruction to the plaintiff's view of the northbound track and whether he was justified in believing that there was only a single track because of the obstruction of his view, the lack of a sign that there were two tracks, and the absence of all safety devices. By ignoring this issue and the testimony of disinterested witnesses supporting the plaintiff, the court below effectually overruled the jury's verdict on this most important single issue in the case *sub silentio*. If that is not a deprivation of the plaintiff's right to have a jury of twelve men and women who heard and saw the witnesses—and not three judges of a reviewing court who neither heard nor saw the witnesses—pass on the facts of his case it is impossible to imagine a situation which would constitute such deprivation.

The Court of Appeals further stated (p. vii, below):

> "Plaintiff knew that he was approaching a place of danger. Even if he had never seen the crossing before, he was advised of the danger by warning signs marking the approach thereto and by his knowledge of the passage of the south-bound train."

This statement ignores the evidence from which the jury could have reasonably concluded that the plaintiff—being entirely unfamiliar with the crossing and a stranger to it, not being warned by the defendant of the existence of the northbound track which was obscured by the terrain and by the defendant's southbound train—was not required to assume the existence of a danger which was not reasonably apparent to him. Emphatically, under the facts of the instant case, the jury could and did find that the plaintiff did not know or have reasonable ground to believe that he was in a place of danger created by an unknown second track and a hidden northbound train.

As *Marietta & Cincinnati R. R. Co.* v. *Picksley*, 24 Ohio St. 654 (1874), involving a railroad crossing accident, in discussing contributory negligence stated (p. 668):

> "The person whose conduct is to be judged can not be separated from the circumstances by which he is surrounded, and under which he is required to act."

It is quite possible that we will have no opportunity to reply to the defendant's answer that may be filed to this Petition. Based on experience with the defendant in the Courts below, we now anticipate two arguments which it will make.

Plaintiff testified by deposition (App. 35) and on the first trial of this case (App. 61) that the train which struck him was on the west track, instead of the east track as he testified on the second trial (App. 35). He was confused by the police report, made by an experienced officer (App. 53), which report showed that the west track was the one involved (App. 212). At the second trial, defendant laid bare this inconsistency (App. 35, 53) and the jury accepted the plaintiff's testimony on the second trial as true.

The defendant also made much capital of the plaintiff's

statement to the defendant's fireman at the scene of the accident, that the "flasher lights were out" (App. 69), and a half hour later in the hospital to the police officer that "I saw the blinker lights go out" (App. 94), when in fact there were no flasher lights or blinker lights at the crossing. The testimony shows clearly that the plaintiff, an experienced truck driver, reasonably expected to find some safety precautions at an extra-hazardous, two-track crossing, and that failing to see the lights flashing, he assumed mistakenly that they had gone out. This, too, was all submitted to the jury, which found in plaintiff's favor.

Neither of the above arguments has any relevance after a jury verdict in favor of the plaintiff.

We respectfully submit that in setting aside the jury's verdict the Court of Appeals ignored evidence favorable to the plaintiff, construed the evidence unfavorably to the plaintiff instead of favorably, and in setting aside the jury's verdict deprived the plaintiff of a trial of the issues of fact by jury guaranteed to him by the Seventh Amendment to the Constitution of the United States.

II.

The Court of Appeals Misinterpreted Ohio Law in Holding the Plaintiff Guilty of Contributory Negligence.

The general rule of Ohio decisional law on the question of contributory negligence in a railroad crossing case is stated by the Supreme Court of that State in *Cleveland, C., C. & I. Ry. Co.* v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321, (1888), as follows (17 N. E., at 324):

> "It is undoubtedly true that persons approaching railroad crossings are bound to the reasonable and prudent exercise of their faculties to discover danger, and to the use of proper care to avoid injury; and, if

the omission of either contributes to their injury, they are generally without remedy. But whether they have so exercised their faculties, and used such care, must depend upon the particular circumstance. For instance, it has been held that the absence of the usual signboard of warning is a circumstance which may properly go to a jury to enable them to determine whether the person attempting to cross the railroad track has been guilty of such negligence as would defeat his recovery. The reason assigned is 'that, if the traveler is a stranger to the crossing, the want of such warning would be calculated to mislead him into danger; and, if he was familiar with the crossing, it might operate as a reminder of danger which he might otherwise forget.' And, generally, 'when the question of contributory negligence depends upon a variety of circumstances, from which different minds may arrive at different conclusions as to whether the plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions.' *Railroad* v. *Whitacre*, 35 Ohio St. 627."

This case has been repeatedly approved by Ohio courts and by the United States Court of Appeals for the Sixth Circuit in which Ohio is located:

Thomas v. *Pennsylvania R. Co.*, 70 Ohio App. 191, 45 N. E. 2d 776, 779 (1942).

Eastern Motor Dispatch, Inc. v. *Pennsylvania R. Co.*, 77 N. E. 2d 275, 277 (Ohio App., 1947).

New York Central Railroad Company v. *Delich*, 252 F. 2d 522, 524 (C. A. 6, 1958).

Particularly on account of the dip in the highway west of the crossing, the omission by the defendant of a sign giving timely warning to eastbound traffic of the existence of two tracks is not simply evidence of negligence on the part of the defendant, but it also was a circumstance to be taken into consideration by the jury in determining whether or not the plaintiff was under all of the circumstances in

the exercise of due care. This interplay between defendant's negligence and plaintiff's obligation to exercise due care is clearly demonstrated by the above quotation from the *Schneider* case, which is the leading Ohio case in this field of law.

The Court of Appeals, after citing the nine Ohio cases which we now itemize, stated (p. vi, below):

"We think that the case at bar bears no factual distinction from the cited cases."

In truth, the Ohio cases cited by the Court of Appeals contain a controlling distinction from the case at bar: the plaintiffs were familiar with the extent of the danger involved because they were familiar with the crossings there involved.

The plaintiff in the case at bar was not familiar with the crossing, the defendant did not warn him of the presence of the second track, and the jury found that the plaintiff reasonably believed the crossing to be only a single track. These facts in the case at bar differentiate our case from the nine cases cited herein by the Court of Appeals for the Seventh Circuit.

Thus, in *Woodworth* v. *New York Central R. Co.*, 149 Ohio St. 543, 80 N. E. 2d 142 (1948), at page 548, the court said:

> "There is undisputed testimony that Woodworth, the decedent, was familiar with the existence and effect of these lights [claimed to obscure a traveler's vision] and had frequently traveled over the crossing in question at night since the installation of the lights."

In *Reed* v. *Detroit, T. & I. R. Co.*, 132 N. E. 2d 776 (Ohio App., 1955), the court stated (p. 778):

> "The appellant urges * * * that the Court committed prejudicial error in admitting the testimony of the decedent's employer upon cross examination to the

effect that the decedent was familiar with the crossing. He testified that the decedent had traveled the same route at least once a week since the latter part of September, the accident occurring on December 17th of the same year. This testimony was pertinent and relative [relevant] to the issues presented and clearly admissible."

In the *Reed* case, therefore, the decision that the plaintiff was guilty of contributory negligence as a matter of law was expressly based upon evidence of plaintiff's familiarity with the railroad crossing involved therein, whereas the evidence in the case at bar is conclusive that the plaintiff herein had no familiarity with the fact that the railroad crossing which looked like a single track, was in reality a double track.

In *Pennsylvania R. Co.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826 (1927), the court said (p. 826 of 159 N. E.):

"Plaintiff was very familiar with this crossing; had been over it both ways more than 100 times * * *."

In *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597 (1939), the court said (p. 598 of 24 N. E. 2d):

"Plaintiff's decedent, who was a coal trucker hauling coal from Coshocton to a point in Bucyrus north of the railroad, had used the crossing frequently and was familiar with it."

Toledo Terminal R. Co. v. *Hughes*, 115 Ohio St. 562, 154 N. E. 916 (1926), held that the plaintiff knew of the existence of the crossing and that driving his car *into a standing train* was contributory negligence as a matter of law.

In *Detroit, T. & I. R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714 (1926), the court said (p. 715 of 151 N. E.):

"The owner of the automobile had lived for more than 3 years within about 100 feet of this crossing, where he carried on a general store, with living quarters in the same building."

In *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448 (1937), the court said (p. 449 of 10 N. E. 2d):

> "The driver was familiar with the locality and testified that in the past a brakeman or other employee of the railroad stood in the street and flagged approaching traffic when a train was about to cross Front Street."

In *Continental Baking Co.* v. *Pennsylvania R. Co.*, 96 N. E. 2d 258 (Ohio App., 1950), the court said (p. 260):

> "For a number of years the driver had driven this route six days a week."

Of the nine cases cited by the court below, only in the case of *Bowman* v. *Baltimore & Ohio Ry. Co.*, 90 N. E. 2d 390 (Ohio App., 1949), is the opinion barren of evidence that the plaintiff was familiar with the crossing involved, and in that case only one train was involved and the only question was whether the existence of a plainly observable obstruction which obscured the approaching train rebutted an inference of contributory negligence on the part of the driver in failing to observe the single train coming toward him.

Familiarity with the rail crossing which the plaintiff here lacked distinguishes the cases cited by the Court of Appeals from the case at bar, as was held in *Zivkoff* v. *Pennsylvania R. Co.*, 90 N. E. 2d 148 (Ohio App. 1948), a crossing collision case wherein the court said (at p. 151) in distinguishing *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597:

> "The facts of the case of *Patton, Admx.*, v. *Pennsylvania R. Co., supra*, are similar to those in the case at bar but with some important differences. In the Patton case, the driver was thoroughly familiar with the crossing; here there was no evidence that he was.

> In that case there were warning devices; here there were none. There is also a substantial difference in the view of the driver approaching a crossing."

The above quotation from the *Zivkoff* case is precisely applicable to the case at bar in differentiating from our facts the facts in the cases cited as controlling by the Court of Appeals.

Although the opinion of the Court of Appeals herein indicates a skepticism on the part of that Court toward the truth of the testimony of the plaintiff that he was unfamiliar with the crossing in question, the plaintiff testified, without contradiction or impeachment, that he had never been on this highway at this crossing before this accident. Although the plaintiff had previously been on U. S. Highway 224, he had not been on the highway at this point. This evidence, which was accepted by the jury, should have been binding on the Court of Appeals, but that Court's refusal to reject the nine cases which it cited, on the ground that the plaintiff here was unfamiliar with the crossing in question, is significant as indicating a refusal by the Court to accept the plaintiff's testimony. Having been accepted by the jury, this evidence, we repeat, cannot now be disregarded.

The following cases, instead of the cases cited by the Court of Appeals, announce the Ohio law applicable to the instant case, namely, that the question of plaintiff's due care was strictly a jury question, and the decision of the Court of Appeals in the instant case is, therefore, at variance and in conflict with the decisions of the Ohio Courts (and, as we shall show, the United States Court of Appeals for the Sixth Circuit) on this question:

Cleveland, C., C. & I. Ry. Co. v. *Schneider*, 45 Ohio St. 678, 17 N. E. 321 (1888).

Thomas v. *Pennsylvania R. Co.*, 70 Ohio App. 191, 45 N. E. 2d 776, 779 (1942).

Eastern Motor Dispatch, Inc. v. *Pennsylvania R. Co.*, 77 N. E. 2d 275, 277 (Ohio App. 1947).
Biery v. *Pennsylvania R. Co.*, 156 Ohio St. 75, 99 N. E. 2d 895 (1951).

The above cases hold that where, as in the case at bar, the question whether the plaintiff's conduct was negligent depends on conflicting evidence or upon inferences to be deduced from a variety of circumstances, the question of contributory negligence is one to be determined by a jury. In compliance with Ohio law, the Court of Appeals should have followed that rule in the instant case.

III.

The Decision Respecting Ohio Law Conflicts With Decisions of the Court of Appeals for the Sixth Circuit in Which Ohio Is Located.

We have already pointed out that in determining as a matter of law that the plaintiff was guilty of contributory negligence, the Court of Appeals for the Seventh Circuit in the instant case did not give adequate consideration to the failure of the defendant to post a warning that what might appear to be a single track—and did so appear to the plaintiff—was in reality a double track, and did not give adequate consideration to the failure of the defendant to give the statutory whistle warning of the approach of the northbound train. These circumstances go not alone to the question of whether the defendant was negligent, but they are also important circumstances bearing upon the question whether the plaintiff was in the exercise of due care.

In failing to give any consideration to these two important points, the decision of the court below conflicts with the decision of the Court of Appeals for the Sixth Circuit

in *Northwest Airlines* v. *Glenn L. Martin Company*, 224 F. 2d 120 (C. A. 6, 1955), opinion by Stewart, Circuit Judge. In discussing contributory negligence in that case, which was a suit by an airline against the manufacturer of an airplane alleged to be defective, the Court of Appeals for the Sixth Circuit in applying Ohio law said (citations omitted) at page 127:

> "One need not anticipate the negligence of another until he becomes aware of such negligence. * * * it is not contributory negligence to fail to look out for danger where there is no reason to apprehend any. * * * One to whom a duty is owed has a right to assume that it will be performed. He is not required to anticipate negligent acts or omissions on the part of others."

The decision in the case at bar is also in conflict with the decision of the Court of Appeals for the Sixth Circuit based upon Ohio law in *New York Central Railroad Company* v. *Delich*, 252 F. 2d 522 (C. A. 6, 1958). In the latter case, the Court of Appeals for the Sixth Circuit held that a truck driver was not guilty of contributory negligence as a matter of law while approaching a multiple track crossing on which he was hit by a train. The defendant railroad in the *Delich* case strongly urged upon the Court of Appeals that it adopt as inflexible the doctrine of *Detroit, Toledo & Ironton R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714 (1926) and *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597 (1939). In the *Delich* case the Court of Appeals for the Sixth Circuit refused to apply blindly the cases typical of the cases applied by the Seventh Circuit herein. Instead, the Sixth Circuit held (p. 526) that where, because of hazards similar to those existing in our case, reasonable minds might differ as to whether the decedent was showing due care, contributory negligence was a question of fact for the jury, and that the trial judge properly overruled defend-

ant's motions for a directed verdict and for judgment notwithstanding the verdict.

The decision of our case by the Court of Appeals for the Seventh Circuit clearly conflicts with the decisions of the Court of Appeals for the Sixth Circuit on an important question of Ohio law.

CONCLUSION.

The judgment below, dealing as it does with the important question of liability for injuries on the highways, with the constitutional right of an Illinois truck driver who was injured in Ohio by a Virginia railroad corporation to have his case tried by a jury, and with the misinterpretation and misapplication of Ohio law by a court located outside of that state, creating a sharp conflict with the decisions of the Sixth Circuit (in which Ohio is located), necessitates the exercise of this Court's important judicial and supervisory power by the issuance of the writ of certiorari as prayed herein.

Respectfully submitted,

OWEN RALL,
135 South LaSalle Street,
Chicago 3, Illinois,

HENRY T. SYNEK,
134 South LaSalle Street,
Chicago 3, Illinois,
Attorneys for Petitioner.

PETERSON, LOWRY, RALL,
BARBER & ROSS,
135 South LaSalle Street,
Chicago 3, Illinois,
Of Counsel.

May 26, 1960.

SUPPLEMENT A.

OPINION BELOW.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

No. 12767. September Term, 1959—January Session, 1960.

RAYMOND E. FISHER,
Plaintiff-Appellee,
v.
CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 14, 1960.

Before HASTINGS, *Chief Judge*, CASTLE, *Circuit Judge*, and MERCER, *District Judge*.

MERCER, *District Judge*. Defendant prosecutes this appeal to review a judgment entered against it upon a verdict of the jury empaneled to try this action for damages for personal injuries sustained by plaintiff in a collision between a truck driven by plaintiff and one of defendant's trains. Errors relied upon for reversal, among others, relate to the failure of the trial court to grant defendant's motions for a directed verdict and its motion to set aside the verdict, or, in the alternative, for a new trial.

The accident in question occurred on February 7, 1954. About noon, on that day, plaintiff was driving a tractor-

trailer combination east on United States Highway 224 near Findlay, Ohio. The day was clear and the road was dry. As plaintiff approached a grade crossing of Highway 224 and defendant's tracks, he saw a south-bound freight train crossing the highway in front of him. When he saw the train, he removed his foot from the accelerator and let his vehicle decelerate by reason of engine drag and loss of power occasioned by that act. When plaintiff was about 600 feet from the crossing, he saw the caboose of the train clear the highway crossing. He then accelerated to a speed which he estimated at 30 to 35 miles per hour. When he reached a point about 150 feet from the crossing, he looked to the right and saw a north-bound train approaching, which was then about 600 feet south of the crossing. Plaintiff then applied his brakes and guided his vehicle back and forth across the highway attempting to stop. He was unable to stop. The front of his tractor collided with the third unit of the three-unit diesel engine of the north-bound train. A state highway patrolman who investigated the accident testified that there were skid marks on the highway for a distance in excess of 113 feet which led to the rear wheels of plaintiff's trailer-tractor combination. Plaintiff's trailer was 32 feet in length. The over-all length of plaintiff's vehicle was the length of the trailer, plus the length of the tractor which he was driving on that date. It thus appears that plaintiff applied his brakes at a point more than 150 feet west of the crossing. Plaintiff testified that, at the rate of speed at which he was traveling at the time he applied his brakes, it would require anywhere from 150 to 190 feet to bring his tractor-trailer unit to a stop, with the total weight and distribution of the load he was then carrying.

At the place of the occurrence the highway crosses defendant's railroad tracks at approximately a right angle. The crossing is level and is marked by a cross-buck cross-

ing signs and a prior warning sign as required by State statute. The only fixed obstruction of a motorist's view to the South was a house located on the south side of the highway some 500 feet west of the crossing. There also was a depression in the highway which reached its low point some 200 feet west of the crossing which, according to plaintiff's testimony, obstructed plaintiff's view to the south as he traveled down-grade to the low point thereof. The only other obstruction of plaintiff's vision as he approached the crossing on the day in question, was the south-bound train which had just passed over the crossing. In this respect, the plaintiff testified that he first saw the north-bound train when the front of the engine of that train came into view from behind the caboose of the south-bound train. Plaintiff had made numerous trips over Highway 224 between Chicago and New York prior to the day of the accident, although he did testify he had never passed this particular crossing before.

The question is not open to us for decision as a matter of first impression. When we apply the law of Ohio, as we must do, *Erie Ry. Co.* v. *Tompkins*, 304 U. S. 64, as pronounced by reported opinions of the appellate courts of that State, we must conclude that the trial court erred in denying defendant's motion for a directed verdict.

The law of Ohio relating to the duty of care required of a motorist approaching a railroad grade crossing is succinctly summarized by the Supreme Court of that State in the language from two of its reported opinions as follows:

> "The law recognizes the fact that ordinarily, because of unalterable circumstances, railroad companies in the operation of fast-moving trains, cannot be responsible for grade-crossing collisions, and that the burden of avoiding such collisions rests, for the most part, on the operators of vehicles using such crossings. This rule is made necessary because railroad trains are, in their operation, confined to fixed tracks, and

because of their weight and momentum cannot be readily stopped within a short distance or space of time." *Woodworth* v. *New York C. R. Co.*, 149 Ohio St. 543, 80 N. E. 2d 142, 146.

"When a traveler upon a public highway approaches a steam railway which intersects at grade the highway, with one or more tracks, with an intention of crossing over, it is the duty of such traveler, before going upon the railway, to look both ways and listen for the approach of trains; and such looking and listening must be at such time and place and in such manner as will be effective to accomplish the ends designed thereby. When the view of such traveler in either direction is temporarily obscured by a passing train, smoke, steam, or dust arising therefrom, it is the duty of such traveler to defer his crossing and remain in a place of safety until such obstruction has passed away and a clear view is afforded." *Pennsylvania R. Co.* v. *Rusynik*, 117 Ohio St. 530, 159 N. E. 826.

See to the same effect, *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597; *Toledo T. R. Co.* v. *Hughes*, 115 Ohio St. 652, 154 N. E. 916; *Detroit T. & I. R. Co.* v. *Rohrs*, 114 Ohio St. 493, 151 N. E. 714; *Reed* v. *Detroit, T. & I. R. Co.* (Ohio App.), 132 N. E. 2d 776; *Bowman* v. *Baltimore & O. R. Co.* (Ohio App.), 90 N. E. 2d 390; *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448.

A brief review of the factual circumstances shown by the evidence in several of the above cases reveals the strict manner in which the Ohio Courts impose the rule against a plaintiff in grade-crossing collision cases.

In the *Woodworth* case, *supra*, the existence of floodlights in close proximity to a railroad crossing which might be confused with the headlight of an approaching train was held to be a circumstance which required the deceased motorist to take added precautions sufficient to avoid a collision.

It appears from the opinion in *Toledo T. R. Co.* v. *Hughes*, 115 Ohio St. 562, 154 N. E. 916, that the collision occurred at night when automatic warning signals installed at the crossing were not working and when the crossing was obscured by heavy fog. In *Patton* v. *Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 597, a collision occurred at night, when the atmosphere was heavy and cloudy. A motorist's view down the tracks was limited to some 300 feet until a point quite near the crossing was reached. To an argument that the atmospheric conditions and noise prevented the driver from detecting the approach of the train in time to avoid the collision, the court said that such circumstances merely required him to take greater precautions and, "under such circumstances, to insure his safety, it may have been his duty to stop before going upon the tracks."

Continental Baking Co. v. *Pennsylvania R. Co.* (Ohio App.), 96 N. E. 2d 258, involved a grade-crossing collision which occurred during darkness on a cold, snowy morning, and which involved a train upon which the court found there were no lights burning. The court held the driver guilty of contributory negligence, saying, 96 N. E. 2d at 262: "Plaintiff's driver was bound to listen as well as look as he was about to cross the track. He looked but couldn't see the train because the night was dark and the train was dark. Under the circumstances, it was his duty to listen in such manner as his listening would be effective to warn him of the approach of the train."

In *Cincinnati, M. & D. M. Freight Co.* v. *Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448, a driver passed the corner of a building which obscured his view of the tracks, and which was located some 45 feet from the crossing, at a speed of 15 miles per hour. At that time he saw a train approaching and braked his vehicle. He was unable to stop and collided with the train. Custo-

marily, the railroad stationed a flagman at the crossing in question, but it failed to do so on the date of the accident. In commenting upon the evidence, the court said, "The effect of this evidence is that the driver of the appellant's equipment passed a point of visibility at a rate of speed which prevented him from stopping in time to avoid a collision if a train was about to cross the street upon which he was traveling. 10 N. E. 2d at 449. Again at page 450, the court said:

> "It is obvious in the instant case and certainly reasonable minds could not differ that had the driver proceeded past the point where visibility was possible, at a speed permitting him to stop after the existence of the caboose and engine on the track was apparent, no injury would have resulted."

To the same effect is *Bowman* v. *Baltimore & O. R. Co.* (Ohio App.), 90 N. E. 2d 390, where it appeared that the injured plaintiff's view of defendant's tracks was obscured by a concrete pier located in a close proximity thereto and by a rise in ground through which the tracks ran in a sub-surface cut.

In each of the cases hereinabove cited and summarized the court held a claim barred by contributory negligence, principally because the plaintiff was in a position of having first seen an approaching train when it was too late for him to stop his vehicle and avoid a collision at his speed of travel. We think that the case at bar bears no factual distinction from the cited cases.

Here plaintiff approached the railroad crossing in level country. There was no obstruction to his view of the tracks in any feature of the crossing itself. Plaintiff slowed down to let the south-bound train pass over the crossing and then, if his own testimony is to be believed, he started accelerating to go across on the assumption that no other train was coming. When he was approximately 150 feet

from the crossing, and at a point where his brakes would not save him if that assumption were incorrect, he saw the diesel engine of the north-bound train emerge from behind the caboose of the south-bound train. Plaintiff knew that he was approaching a place of danger. Even if he had never seen the crossing before, he was advised of the danger by warning signs marking the approach thereto and by his knowledge of the passage of the south-bound train. Under the circumstances, it was not the exercise of due care for his own safety to proceed toward the crossing at such a speed and in such manner that the brakes of his tractor-trailer would not save him in the event that a second train was approaching the crossing from the south. Applying Ohio law to the facts of this case, we must conclude that plaintiff was guilty of contributory negligence as a matter of law, and that the trial court erred in denying defendant's motion for a directed verdict. *Patton v. Pennsylvania R. Co.*, 136 Ohio St. 159, 24 N. E. 2d 597; *Cincinnati M. & D. M. Freight Co. v. Louisville & N. R. Co.*, 56 Ohio App. 246, 10 N. E. 2d 448.

Other errors urged by defendant are not considered.

The judgment is reversed and the cause is remanded to the district court with directions to enter judgment for the defendant and against plaintiff.

SUPPLEMENT B.

JUDGMENT BELOW.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Monday, March 14, 1960

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

RAYMOND E. FISHER,
Plaintiff-Appellee,
vs.
CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation,
Defendant-Appellant.

No. 12767

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED with costs; and that this cause be, and the same is hereby REMANDED to the District Court with directions to enter judgment for the Defendant and against the Plaintiff.

SUPPLEMENT C.

ORDER DENYING REHEARING.

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, April 13, 1960

Before:

Hon. John S. Hastings, Chief Judge.
Hon. Latham Castle, Circuit Judge.
Hon. Frederick O. Mercer, District Judge.

RAYMOND E. FISHER, *Plaintiff-Appellee,*

No. 12767 *vs.*

CHESAPEAKE & OHIO RAILWAY COMPANY, a Corporation, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.